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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 810.

M. ELI LIVINGSTONE,
PETITIONER,

v.

FATIMA CHARITIES, INC., and
MICHAEL P. GRACE, II,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinions below are correctly cited on page 2 of the petition.

Jurisdiction

The jurisdiction of this Court is founded as stated on pages 2 and 3 of the petition.

Questions Presented

The respondents disagree with the Statement of Questions Presented in the petition. They say that the questions are:

1. Whether the court below has decided an important question in a way in conflict with applicable state law;
2. Whether the decision below was correct.

Statutes Involved

There are no statutes involved.

Statement of the Case

The respondents are in substantial agreement with the petitioner's statement of the facts as set forth in pages 3 to 7 of the petition. However they wish to point out certain errors and omissions.

1. In reciting the circumstances surrounding the extension of the option and the payment of respondent Grace's loan at the Guaranty Trust Company, the petitioner neglects to include a recital that on such payment the petitioner took possession of the bonds, not only as borrower, but as pledgee, as security for Grace's obligation to pay to the petitioner the amount paid to the Guaranty Trust Company. The petitioner so admitted in his answer (A. App. 10a - 11a) and the trial judge so found (A. App. 174a). Furthermore, in replying to the respondents' letters notifying petitioner of the exercise of the option, (P. E. 11 and 13, A. App. 159a, 161a) the petitioner requested authority

> "to purchase these securities and to satisfy the existing lien" (P.E. 13, A. App. 162a);

and the letters forwarded by the petitioner with said reply for signature and return by the respondents (P.E. 13-A, 13-B, A. App. 165a) (which were not signed or returned) contained the words "after reimbursing yourselves for your lien".

The respondents believe this fact to be without significance on the actual merits of the controversy, but point it out because the extraordinarily formalistic argument of the petitioner herein seems to be entirely based on the premise that when the respondents attempted to exercise the option they had the status only of lenders of the bonds with no property interest therein (Petition pp. 10-13). The trial judge said, and the respondents agree, that all that was significant was the fact that prior to the exercise of the option the respondents had transferred the bonds to petitioner (A. App. 178a). Whether the transfer was outright, or by way of pledge or loan, was not significant.

2. In a footnote at p. 5 of the petition, the petitioner calls attention to the language of the option (P.E. 3, A. App. 151a) reciting that

> "It is intended that the above identified bonds shall be used in exercising this option".

The petitioner fails to point out that the "identification" was merely a recital of amount and series of the bonds. No Bond numbers were given.

Again the respondents believe the fact to be without real significance on the merits of the controversy but of interest only in the light of the petitioner's argument.

3. The respondents disagree with the paraphrase of the petitioner's reply to the respondents' letters exercising the

option (Petition pp. 6, 7). As a matter of hindsight the petitioner would undoubtedly have written in accordance with his counsel's paraphrase in the petition. However the letter (P.E. 13, A. App. 162a, 163a) and the enclosures (P.E. 13A, 13B, A. App. 164a, 165a) conveyed an entirely different message. In the first place the petition fails to point out that the letter referred to enclosed unconditional confirmations of purchase at the option price (P.E. 15a, 15b, 15c, A. App. 166a). Furthermore the letter said

> "In each case there is enclosed a letter for signature authorizing us to purchase these securities and to satisfy the existing lien" (P.E. 13, A. App. 162a).

Authority to purchase in this setting could only mean authority to the petitioner to purchase more bonds in the market for the respondents' account. More bonds were not needed. The respondents were trying to *sell* the bonds of which they were lenders and pledgors, not to obtain more. Turning to the enclosures referred to in the forwarding letter, they make the situation more confusing, and more remote from the paraphrase. They state

> "Please liquidate for my account"

with a recital of the appropriate amount of bonds involved (P.E. 13A, 13B, A. App. 164a, 165a). This could only mean authorization to sell for the account of the respondents in the open market bonds which the respondents would then have to purchase to cover the sale. As pointed out above the respondents were trying to close out the account in accordance with their rights granted in the "put", and not to become involved in further transactions.

4. The respondents disagree with the footnote at page 7 of the petition. Therein the petitioner states that

> "it is a fair inference that respondents did not reply to petitioner's letter because of their 'unwillingness to recognize petitioner's claim to said interest'".

The difficulty with this suggestion is that the trial judge specifically refused to draw such inference (A. App. 179a), and correctly ruled that the only evidence on the point was that the respondent Grace made the claim that interest was not agreed on some months after June 1955, and that there was no evidence that Grace's view on the subject was communicated to the petitioner until long after the option period expired.

Argument

I.

Rule 19 of the Rules of this Court provides that certiorari will be granted only where there are "special and important reasons therefor". None of the illustrations contained in paragraph 1 (b) of the Rule, which refers to Courts of Appeals, have even a remote bearing on the issues presented by the record in this case excepting that contained in the clause

> "or has decided an important state . . . question in a way in conflict with applicable state . . . law.":

In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) this Court stated that "Special and important reasons" imply a reach to a problem beyond the academic or the episodic". It further stated that the writ should not issue to satisfy a scholarly interest or for the benefit of particular litigants.

Petitioner presents the question involved in quite general terms, asserting it to be of far reaching consequence

to the business community. But when the essential facts of this controversy are looked at, as they must be, the question pales in importance. It struggles hard to reach the level of even the episodic, and is not of academic importance. For the facts present merely a case of a securities transaction between the parties Grace and Livingstone, a disagreement over the terms thereof, and a rearrangement, as to the financing of the transaction. Under this rearrangement, petitioner gave defendant Grace a "put" as to the securities, loaned Grace the money for the payment of a bank loan, and in consideration received the securities involved, which he used to cover his own short sales.

When so viewed, Judge Wyzanski's decision, affirmed *per curiam* by the Court of Appeals for the First Circuit, does not, as contended by the petitioner, define in universal terms the rights and obligation of the myriads of relations among customers and brokers and dealers in the securities marketplace. It applies only to the unusual situation of a securities dealer, a specialist in the type of transaction involved in this case, who also acts as banker in the transaction, and as such, disposes of stock pledged with him in connection with the customer's loan. The questions of the legal effects of these extremely torturous transactions are only of interest to petitioner and those other securities dealers, if any, on the fringes of the securities market, who carry on banking functions connected with the sale of securities, and who are authorized in such banking activities to dispose of the securities pledged in connection with the financing arrangement. The disposition of the securities by petitioner is essential, for then, and only then, may the question presented by this case be raised. If either the purchaser or the dealer still holds the securities, no such question can be raised. The Massachusetts law is clear.

Viewed in this light, the decision seems of importance only to petitioner Livingstone, and can hardly effect a great number of persons or transactions, especially when it is realized that the decision is only applicable to those transactions which have the necessary contacts with Massachusetts under conflict of law principles.

See *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487 (1941).

And as so considered, the matter is not worthy of review by this Court.

II.

The narrow question presented by the record in this case was decided in a way which is in conformity with state law. The District Court and the parties have agreed that the applicable state law is that of Massachusetts. The closest case on its facts to the precise facts of the case at bar, which the respondent could find in any common law jurisdiction, was a Massachusetts case. In *Armstrong* v. *Orlick*, 220 Mass. 112 (1915) (not cited in the petition herein) the plaintiff purchased securities from the defendant, a dealer, and was simultaneously given an option to resell to the defendant. He later pledged the securities with the dealer for a loan. Later, he notified the dealer that he was exercising his option to resell and demanded the money balance of the difference between the option price and the amount of the loan. On these facts a trial judge found for the plaintiff for the balance, and the finding was sustained by the Massachusetts Supreme Judicial Court.

Only two of the Massachusetts cases cited in the petition involve options or "puts" at all. They are *Boynton* v. *Woodbury*, 101 Mass. 346 (1869) and *Williams* v. *Patrick*, 177 Mass. 159 (1900). There is nothing in either of them

which precludes or even affects the result reached herein below. They stand for the proposition that when securities are sold, with an option to resell, the buyer, during the "put" period, has the option to treat the original sale as a loan of the purchase price secured by the securities or, if he decides not to exercise the option, as an outright sale. *Williams*, which was later than *Boynton*, points out that, when the buyer decides to exercise the option, he must tender the securities if the contract expressly so provides, although ordinarily a lender can sue without tender of the collateral. *Williams* goes on to point out that, even though the contract expressly requires tender, it can be waived. The respondent contends that any consensual arrangement whereby the buyer parts with the securities either by transfer to the seller, or to a third person with consent of the seller, is a waiver, if tender were required.

The balance of the Massachusetts cases cited do not involve facts even remotely similar to those in the case at bar with the exception of *Donovan* v. *Draper*, 268 Mass. 555 (1929) and *Krinsky* v. *Whitney*, 315 Mass. 661 (1944). They hold that a customer who has a margin account with a dealer can require the dealer to liquidate the securities in the account, and remit the balance, by a communication to the dealer in any form of words, that he desires to close out the account. They fully support, at least on a "compare" basis, the result reached in the courts below.

Finally, an analysis of what the petitioner contends is required by Massachusetts law, makes it seem unlikely as a requirement of any modern system of jurisprudence. He says in effect that in order to exercise the option respondent Grace and his assignees would have had to tender to petitioner the million odd dollars owed by Grace and demand the return of the bonds borrowed. Upon such tender and demand the petitioner, who had sold the bonds, would then purchase in the open market the million odd of bonds loaned

and give them to Grace and his assignees. Then Grace and his assignees would give the bonds back to the petitioner who would then pay over the "put price". Instead, the courts below, have approved an accounting of the conflicting balances which were in definite and fixed amounts, and have ordered the payment of the balance in favor of respondent Grace and his assignees. This would seem to be not only good law but good sense.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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